

Nos. 11-1742/1744

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA BARACHKOV; NANCY ENGLAR;)
CAROL DIEHL,)
)
Plaintiffs-Appellees,)
)
v.)
)
41B DISTRICT COURT; TOWNSHIP OF)
CLINTON,)
)
Defendants-Appellants (11-1744),)
)
LINDA DAVIS, of the 41B District Court,)
individually and in her official capacity,)
)
Defendant-Appellant (11-1742).)



O R D E R

Before: BOGGS, GIBBONS, and COOK, Circuit Judges.

In this civil rights action, the plaintiffs claimed wrongful termination from employment for the 41B District Court of Michigan in violation of procedural due process rights. Linda Davis, the chief judge of that court, appealed the denial of qualified immunity (11-1742). The court and the Township of Clinton, where the court sits, also appealed (11-1744). The plaintiffs moved to dismiss both appeals. The court and the Township voluntarily dismissed their appeal, and in a prior order, we granted the plaintiffs' motion to dismiss Judge Davis's appeal. The plaintiff now moves for the assessment of costs and fees in both appeals.

Under Federal Rule of Civil Procedure 38, "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable

Nos. 11-1742/1744

- 2 -

opportunity to respond, award just damages and single or double costs to the appellee.” The award of costs and fees under Rule 38 is discretionary. *Dubay v. Wells*, 506 F.3d 422, 432 (6th Cir. 2007). “We have explained that ‘the awarding of sanctions under Rule 38 is predicated upon a finding that (1) the appeal is frivolous, and (2) sanctions are appropriate.’” *Id.* (quoting *Allinder v. Inter-City Products Corp.*, 152 F.3d 544, 552 (6th Cir. 1998)). While a finding of bad faith is not necessary to impose sanctions under Rule 38, “we have observed that ‘[w]e will *usually* impose Rule 38 . . . sanctions only where there was some improper purpose, such as harassment or delay, behind the appeal.’” *B & H Medical, LLC v. ABP Admin., Inc.*, 526 F.3d 257, 270 (6th Cir. 2008) (quoting *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1212 (6th Cir. 1997) (emphasis in original)).

We decline to award Rule 38 costs. Nothing indicates that the appeals were taken for an improper purpose. Although we concluded that No. 11-1742 presented only an issue of fact, such determinations are not always easily made. *See Jacob v. Killian*, 437 F. App’x 460, 469 (6th Cir. 2011) (declining to impose sanctions where third interlocutory appeal “raises some legitimate, albeit unmeritorious, issues based on facts that have been further developed since [a] prior motion”). Further, the Court and the Township promptly voluntarily withdrew their appeal in No. 11-1744.

Therefore, the motions for the assessment of Rule 38 costs in these appeals are DENIED.

ENTERED BY ORDER OF THE COURT



Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Leonard Green
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: March 07, 2012

Ms. Deborah L. Gordon

Mr. Joseph Nimako

Ms. Sarah S. Prescott

Re: Case No. 11-1742, *Patricia Barachkov, et al v. 41B District Court, et al*
Originating Case No. : 04-73957

Dear Sir or Madam,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Louise Schwarber
Case Manager
Direct Dial No. 513-564-7015

cc: Mr. David J. Weaver

Enclosure